UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

RXI PLASTICS, INC.

and **Case No. 6-CA-29008**

BRIAN KINDER, AN INDIVIDUAL

Sandra Beck Levine, Esq.,
for the General Counsel.
Roger D. Meade, Esq. (Littler, Mendelson, PC), for the Respondent.
Brian Kinder, pro se.

DECISION

Statement of the Case

Michael O. Miller, Administrative Law Judge: This case was tried in Pittsburgh, Pennsylvania on March 24 and 25, 1998 based upon a charge which was filed by Brian Kinder, an individual, on May 12, 1997[1] and a complaint which was issued by the Regional Director of Region 6 of the National Labor Relations Board on January 29, 1998. The complaint alleges that RXI Plastics, Inc. (RXI or Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by the statements of two supervisors threatening employees with the loss of work opportunities if they continued to discuss union representation. Respondent's timely filed answer and amended answer deny the complaint's allegations and affirmatively assert that the persons to whom any such statements were made were statutory supervisors and therefore beyond the Act's protections.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the oral arguments[2] presented on behalf of the General Counsel and the Respondent, I make the following:

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[1] All dates are in 1997 unless otherwise indicated.

[2] Upon closing the hearing, I had noted that this would have been an appropriate vehicle for the exercise of prosecutorial discretion referred to (but seldom used) within the Agency as a "merit dismissal." I further noted that inasmuch as that course had not been followed and the matter had been litigated before me, I would decide this case upon the merits. After the close of hearing, Respondent's counsel submitted a brief letter containing decisional support for a dismissal under a *de minimis* theory, in light of these remarks, and the Counsel for the General Counsel submitted a similarly brief letter with citations of authority as to the inappropriateness of such a dismissal. As I have decided the case upon the merits, I need not reach either of these arguments. I will receive these documents and include them in the record, in the nature of an expansion upon the oral arguments.

Findings of Fact

I. Jurisdiction

RXI, a corporation, manufactures plastic bottles and lids at its facility in Triadelphia, West Virginia. It annually sells and ships goods valued in excess of $50,000 from that plant directly to points outside the State of West Virginia. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Background

There have been at least two recent periods of union activity on behalf of the United Mine Workers of America (UMWA)[3] among Respondent's small workforce, one beginning about April 1995, well before the events described herein, and one commencing in October or November 1997, after those alleged events. Neither resulted in either a representation election or selection of the Union as the employees' bargaining representative. There was no active campaign in progress when the statements described below were allegedly made. However, the employees had, to some extent, continued to discuss union related matters even after the prior campaign had concluded.

Beginning in late 1996 or early 1997, RXI developed and announced plans to expand its Triadelphia plant. RXI's president, Thomas Richmond, spoke of those plans and copies of the architectural drawings and orders for new machinery were posted where the employees could see them.

B. Richmond's Remarks to the Steering Committee

In January 1997, RXI created what it called the "Steering Committee," made up of employees elected in their departments who would meet monthly with members of management to discuss issue of mutual interest.[4] RXI President Richmond attended the January and February meetings.

The General Counsel contends that, in the course of the second meeting of the Steering committee, Richmond threatened to discontinue expansion of the Triadelphia plant and transfer work to other facilities because of the employees' interests in, and discussions of, the Union. On this issue, the General Counsel bears the burden of proof.

It is clear that, in the course of this meeting, Richmond reviewed the expansion plans, mentioned RXI's other plants[5] and made some reference to union activity. It is how he put these issues together that determines whether any threats were uttered.

Deborah Shaw, a machine operator, described Richmond talking about the plant

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[3] I take official notice that the UMWA is a labor organization within the meaning of Section 2(5) of the Act.

[4] There is no allegation that the creation of the Steering Committee or the meetings held with it violated the Act in any way. The elected representatives on this committee included both lead operators, who, like Brian kinder, the charging party, are contended by Respondent to be supervisors beyond the Act's protections, and statutorily protected employees. I need not reach the supervisory issue inasmuch as there was at least one statutory employee present when each of the threats was allegedly uttered.

[5] Respondent has five other plants; Triadelphia is the only plant performing injection molding.

expansion and the new equipment which was being brought in. In response to generally leading questions, she struggled to recall that Richmond had commented "that he had four or five other companies he could take his machines to." To this, Shaw told him, "Then do it." He replied, according to her recollection, "I didn't say that I was going to do it, I said I could do it." At some point in his remarks, Shaw related, Richmond also said that he "would rather talk to them than to a third party" and that he "would like to get rid of this overhead of a union."

Shaw's testimony was corroborated in some, but not all, respects by Edward "Ace" Coleman, a lead operator at the time of the meeting but now an acknowledged supervisor. He was a reluctant witness who purported to have little present recollection of the meeting. He did recall, without prompting, that Richmond had said that he liked the Triadelphia plant, that he had started with the company at that plant and liked the people there but does have other plants to which he could send the new equipment. Even after repeatedly reviewing his affidavit, he recalled nothing further, specifically nothing related to unions. However, he read the affidavit which he had given to a Board agent about seven months after the meeting and acknowledged that his statements therein were, as best he could recall, true and correct when he signed it. In that statement, he had related that Richmond referred to the complaints he was hearing at the Steering Committee meetings as petty. Richmond, his affidavit related, then stated that he had five other places to expand but liked the Triadelphia plant and its workforce and preferred to expand there. Then, according to Coleman's written recollection, Richmond said, "There was still a little talk of unions over (their) heads and he repeated that the had five other plants where he could expand." To this, the statement related, Shaw told Richmond to "go ahead." Coleman had recalled no response from Richmond.

A third witness proffered by Counsel for the General Counsel, Thomas Donahue, recalled only that Richmond had said that he would like to put more money into the plant but "under the current situation" was afraid to do so "because of the tension going on right now." It was Donahue's understanding that "current situation" referred to an ongoing union campaign. He had no recollection of any mention of the new machines and did not mention any reference to other plants. Neither did he recall anyone responding to Richmond's statements. Other than testifying, in error, that there was an ongoing union campaign at that time, Donahue did not describe what caused him to arrive at his understanding that the "current situation" referred to union activity.

Richmond acknowledged mentioning many of the same themes but put them in a different order and under a different light. As he recalled the meeting, he discussed the expansion plans, referring to the scope of the expansion, to the new equipment and to the new customers and made it clear that the expansion was underway at the cost of several million dollars. He also said that he had looked elsewhere to expand but liked Triadelphia best and therefore chose to expand there. He then discussed rumors which he had heard concerning the company shutting down or moving because of union activity and assured those present that this was not true and that such rumors were unproductive. Shaw, he testified, asked why he didn't shut it down, and he replied that he could not do that, that they had contracts to supply their customers from this plant and the other plants did not have the equipment to meet those contracts.

Respondent also adduced the testimony of Jill Pritchett, an employee who attended that meeting. She corroborated Richmond's testimony concerning discussions of plant expansion and denied that Richmond had suggested that the plant would not expand or that machines would go to other plants. With respect to any mention of union activity, she claimed, it was after Shaw referred to rumors of union activity in the plant, that Richmond discussed communications and told employees that his door was always open.

Prior to this meeting, orders had already been placed for new machinery, at

considerable expense. The construction for the plant expansion began in March, within a month after the second Steering Committee meeting.

Thomas Richmond was a forceful and persuasive witness who candidly acknowledged that he did not wish to see his plant unionized. The General Counsel's witnesses, while not dissembling, were vague (at best) concerning their recollections; the testimony of Shaw and Donahue was essentially inconsistent and Coleman offered no present recollection of Richmond's statements. Moreover, his affidavit, given nearly seven months after the meeting, at most carries an implication of a threat, a threat which was somewhat negated by the earlier statement attributed to Richmond that he liked this plant and its people and preferred to expand there. Richmond's denial of the threat is bolstered, and the employees' versions weakened, by the probabilities. With commitments made and large sums of money already expended on the expansion plans, that a threat not to expand if union discussions continued would be uttered is somewhat illogical. That the expansion plans were already underway, and significant monetary commitments had been made also makes the threat Donahue attributed to Richmond (not to put more money into the plant) implausible. The absence of any on-going organizational campaign or evidence of any extensive union activity similarly makes the utterance of such threats less likely. On this record, I cannot find that the General Counsel's burden of establishing the violation by a preponderance of the evidence has been met.

C. Kibert's Alleged Statement to Kinder and Hungerman

Brian Kinder is a lead lining technician (equivalent to a lead operator) working on the midnight shift in the finishing department. He was a supporter of the Union and openly displayed that support by wearing a cap with the union logo. Respondent's supervisors, including production manager Joseph Kibert, were aware of his pro-union sentiments.

In about March, according to Kinder, he and Roger Hungerman (an acknowledged employee) were talking with Kibert on the plant floor at the end of a shift. In the course of a discussion of the plant expansion and the acquisition of new machinery, Kibert allegedly told them, "If you people keep talking about this Union, that never will happen." Kibert credibly denied that he had any conversation with Kinder and Hungerman concerning the union activity. Hungerman was not a witness for either party.

Based upon the foregoing, I am unable to find that the General Counsel has established the alleged violation by a preponderance of the evidence. Both Kinder and Kibert presented themselves as credible witnesses. However, the General Counsel's failure to present Hungerman in corroboration of Kinder's testimony impacts negatively upon my determination as to whether the General Counsel's has met his burden of proof.[6] Moreover, as noted above, it is

[6] Counsel for the General Counsel established that Hungerman had been severely injured some weeks before the hearing, incurring head injuries requiring surgery. It was not established that his injuries impaired his memory and Respondent countered with evidence that Hungerman had returned to work with no restrictions on his activities. On this state of the record, I find nothing which would have precluded Counsel for the General Counsel from calling Hungerman as a witness. However, contrary to Respondent's contention, "the [adverse inference] rule only applies when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party." No such assumption is warranted here and, accordingly, I decline to draw such an inference based upon the General Counsel's failure to call Hungerman. On the other hand, it is appropriate that the failure to call an identified and potentially corroborating witness may properly be considered by the administrative law judge in determining whether the General Counsel has established the violation by a preponderance of the evidence and I so consider it here. *C & S Distributors, Inc*., 321 NLRB 52, fn. 2 (1966); *Queen of The Valley*

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less than plausible that Kibert would have threatened that there would be no plant expansion if the union activity continued at a point in time when that expansion was already underway and there was only minimal union activity going on.

Accordingly, I shall recommend that each of the allegations of this complaint be dismissed.

Conclusions of Law

Respondent has not violated the Act in any manner alleged in the complaint

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. April 21, 1998

Michael O. Miller
Administrative Law Judge

Hospital, 316 NLRB 721, fn. 1 (1995).

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.